Succession. Intestate succession to movables and immovables is governed by the national law of the decedent.[36] The material conditions and effect of a will, whether it relates to movable or immovable property, are determined by the law of the home country of the testator at the time of the execution of the will.[37] A change of nationality produces no effect. A will is sufficient in formal respects regardless of the character of the property, if it satisfies the law of the home country of the testator at the time of the execution of the will or the law of the place of execution.[38] A will may be revoked according to the law of the home country of the testator at the time of revoking, or according to the law of the place of the act.[39]

The foregoing summary shows that the Japanese legislator has accepted the continental rules of the conflict of laws. Only in one instance can there be seen any approach to the English system, namely, in the rule governing torts. One or two points deserve special attention. Contrary to the prevailing view on the subject it accepts the *renvoi* in the limited form suggested by the German Civil Code. With respect to the question of nationality it has decided a point which has troubled the continental writers a good deal.[40] What is the law of a party's nationality for the purpose of the conflict of laws when he is claimed as a subject by two or more foreign governments? The Japanese law adopts the rule that it is the law of the country whose nationality was last acquired. As regards contracts by correspondence it is interesting to note that the Japanese law accepts the law of the place from which the offer was sent, except that the law of the domicil of the offeror is substituted if the recipient of the offer was ignorant of the place from which the offer was sent.

E. G. L.

IMPLIED WARRANTIES OF WHOLESOMENESS AGAIN

Charged waters replace strong waters, and with the change come perils little thought of. A recent case[1] lists "articles inherently dangerous": poisons, dynamite, gunpowder, torpedoes—and soft drink bottles! One who manufactures such articles, says the court, is liable in tort to third parties whom their explosion injures, unless he can prove that he has exercised reasonable care with reference to the article manufactured. Such treatment of the pop-bottle as of itself a danger-

[36] Art. 25.
[37] Art. 26.
[38] Art. 26, par. 1.
[39] Art. 26, par. 2.
[40] See (1920) 20 COL. L. REV. 250-252.

[1] *Johnson v. Cadillac Motor Car Co.* (1920, C. C. A. 2d) 261 Fed. 878, (1920) 29 YALE LAW JOURNAL, 568. In this comment the attempt is to analyze, not to state the law in full, nor to give full citations. For more complete and detailed statement of the positive law see (1918) 27 YALE LAW JOURNAL, 1068, (1919-20) 5 IOWA L. BULL. 6, 86, and the other comments collected in note 16.

ous instrument has been by no means universal,[2] but there is considerable authority in its favor, particularly among the very recent cases.[3] There is some difference of opinion on whether knowledge by the manufacturer that *his* bottles explode is a condition to imposing the strict duty upon him;[4] and there is a difference as to what facts suffice to establish *prima facie* breach of that duty in the individual case.[5] But there seems to be unanimity among American plaintiffs in laying their case in tort. Our English brethren have found a simpler method of recovery—perhaps under pressure of necessity, since they do not recognize the liability in tort.[6] In *Geddling v. Marsh* (1920, K. B.) 36 Times L. R. 337, recovery was allowed a vendee under the Sale of Goods Act, 1893, sec. 14 (1)—our Sales Act, sec. 15 (1)—on an implied warranty. To be sure, the *bottles* had not been sold with the mineral waters, but hired against a deposit, as is usual here as well. But the court held the bottles to be goods "supplied under a contract of sale"; hence, since they were known to be for the particular purpose of containing the drinks, and since the buyer relied on the seller in regard to them, there was an implied warranty of their fitness for that purpose. The decision seems a fair interpretation of the statute; it makes negligence immaterial, thus going beyond even the *res ipsa loquitur* rule; it will hoist dealer as well as manufacturer on his own gas-charged petard.

Implied warranty of this kind is a growing thing. It has currently been thought to confer rights on vendees only. Indeed there was a long-persistent tendency to look upon rights even in tort for injury suffered from defective goods as founded on a "legal duty incident to" the contract, although not contained in its terms, and so to limit such rights to persons "privy" to the contract—whether sale or

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[2] *Glaser v. Seitz* (1901, Sup. Ct.) 71 N. Y. Supp. 942, 35 Misc. 341; *O'Neill v. James* (1904) 138 Mich. 567, 101 N. W. 828, 68 L. R. A. 342; *Stone v. Van Noy R. R. News Co.* (1913) 153 Ky. 240, 154 S. W. 1092.

[3] *Weiser v. Holzman* (1903) 33 Wash. 87, 73 Pac. 797; *Grant v. Chero-Cola Bottling Co.* (1918) 176 N. C. 256, 97 S. E. 27, considerably extending *Cashwell v. Fayetteville Pepsi-Cola Bottling Works* (1917) 174 N. C. 324, 93 S. E. 901; *cf. Colyar v. Little Rock Bottling Works* (1914) 114 Ark. 140, 169 S. W. 810; *cf. Payne v. Rome Coca Cola Bottling Co.* (1912) 10 Ga. App. 763, 73 S. E. 1087.

[4] Such knowledge necessary: *Colyar v. Little Rock Bottling Works, supra; Stone v. Van Noy R. R. News Co., supra. Contra, Payne v. Rome Coca Cola Bottling Co., supra; Weiser v. Holzman, supra; cf. Grant v. Chero-Cola Bottling Co., supra.*

[5] Applying *res ipsa loquitur* from the mere fact of the one explosion: *Payne v. Coca-Cola Bottling Co., supra.* Denying *res ipsa loquitur: Glaser v. Seitz, supra; O'Neill v. James, supra; Cashwell v. Fayetteville Bottling Co., supra.* Allowing evidence of other explosions to go to jury: *Dail v. Taylor* (1909) 151 N. C. 284, 66 S. E. 135, 28 L. R. A. (N. S.) 949; *Colyar v. Little Rock Bottling Works, supra.*

[6] *Earl v. Lubbock* (C. A.) [1905] 1 K. B. 253; *Bates v. Batey* [1913] 3 K. B. 351.

bailment or whatnot.[7] It was a great advance to free the tort duty of the maker from such an arbitrary delimitation of the persons protected by it. It might be an advance equally great to cease attempts to mark off classes of ordinary articles, dangerous articles, and foods and drugs, with specifications of the degree of care required of a maker in each class, and to lay down a single controlling principle: that any maker of any article is under a duty to any legitimate user, in making the article and putting it into commerce, to use care commensurate to the nature of the article; or, still more sweepingly, that any person putting an article in the way of being used by another, is under a duty to use the care proper in view of what he ought to know of the nature and use of the article.[8]

But is it an equal advance to extend indefinitely the class of persons protected by an *"implied warranty"?* One comes on dicta that such a "warranty" may give full rights to a person for whose benefit it was intended, though he be not the buyer.[9] And in *Davis v. Van Camp Packing Co.* (1920, Iowa) 176 N. W. 382, where the son of the purchaser from the retailer who bought from the wholesaler who bought from the manufacturer, was suing the last on an implied warranty of wholesomeness of a can of beans, it was held error not to let the case go to the jury on that question. "The question as to privity is not controlling."[10] It was also held, and wisely so, that the possibility of recovery on such a warranty did not exclude the possibility of an alternate recovery for negligence; and that the plaintiff might join counts drawn on the two theories.[11]

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[7] See 29 *Cyc.* 478; and see *Dail v. Taylor, supra,* doubted in *Cashwell v. Fayetteville etc. Works, supra,* and repudiated in *Grant v. Chero-Cola Bottling Co., supra.*

[8] Here, as elsewhere where matters relating to torts are touched on, the writer is indebted to the suggestions and criticism of Professor Edward S. Thurston. See also Chapin, *Torts* (1917) 517; and see the language of Brett, M. R. in *Heaven v. Pender* (1883) 11 Q. B. D. 503. "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger."

[9] See e. g. *O'Neill v. James, supra;* (1918) 27 YALE LAW JOURNAL, 1071, note 15; *cf. Lewis v. Terry* (1896) 111 Calif. 39, 43 Pac. 398; *Tomlinson v. Armour & Co.* (1908, Ct. Err.) 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

[10] See in accord *Catani v. Swift & Co.* (1915) 251 Pa. 52, 95 Atl. 931.

[11] That the two theories can coexist is so obvious as to need no further argument. (1918) 27 YALE LAW JOURNAL, 1068, 1073. And the modern decisions are taking this view. See the admirable set of Massachusetts decisions: *Ward v. Great Atlantic etc. Co., Ash v. Childs Dining Hall Co., Friend v. Same* (1918) 231 Mass. 90, 86, 65, 120 N. E. 225, 396, 407; *Walters v. United Grocery Co.* (1918, Utah) 172 Pac. 473; *Ward v. Morehead City Sea Food Co.* (1916) 171 N. C. 33, 87 S. E. 958; see *Tavani v. Swift & Co.* (1918) 262 Pa. 184, 105 Atl.

There is much work still to be done before it will become clear what is truly meant by "implied warranty" in such a case. Roughly, it may be suggested that it is an insurer's duty on the warrantor to make good damage—measured either as if in contract or as if in tort—caused to the warrantee by non-conformance of the goods with the warranty; that it arises normally in conjunction with a sale; and that it arises, theoretically, out of a tacit representation by seller to buyer, on which the buyer reasonably relies.[12] But "tacit" representations need interpretation. Is the representation one of good faith merely, or of diligence, or of the objective existence of a quality? Is it: "this article is, flatly, thus"; or "it is thus, as far as my due care could make it"; or merely "it is thus, so far as I know"? Under our law, where the warranty exists at all, the strong tendency is to measure it as a flat representation of the existence of the quality concerned. There is a further tendency to standardize both the representation and the reliance on it: "Where a dealer sells food for immediate consumption, there is always an implied warranty of

55; and see the dissent in *Drury v. Armour & Co.* (1919, Ark.) 216 S. W. 40. Nor is there sound reason why counts on the two theories should not be joined, even in jurisdictions which will not allow joining counts in tort and contract. Current conceptions notwithstanding, warranty is quite as much tort as contract, especially implied warranty. Unlike assumpsit, warranty actions have never been freed from the marks of their origin in tort. It is not only that the damage recoverable is normally measured as in tort. The duty involved, as is sought to be shown in the text, is closely related to the tort duty to use care; and where the rule of the *Davis* case is applied, the duty is as "general" as in tort. And finally, suit in tort still lies in some jurisdictions *on the warranty*. See *Farrell v. Manhattan Market Co.* (1908) 194 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436; *cf. Hobart v. Young* (1891) 63 Vt. 363, 21 Atl. 612. The waste of time, money and energy where a plaintiff is forced to select a single theory appear in the cases generally. See e. g. *Ash v. Childs Dining Hall Co., supra.*

[12] It is not intended here to deal in any way with those so-called implied warranties which are merely interpretations of the words of the contractors, as when "Manilla hemp" is held to mean "merchantable Manilla hemp." Such a "warranty"—like any term of any executory contract—raises the question primarily of the measure of a *promise* or a *condition* of *future* happenings; the question concerning it comes up most often in comparing the promise or condition with the alleged fulfillment of it. But an "implied warranty" proper raises the question of the measure of the *representation* of *existing fact*, and is related more closely to estoppel than to contract. One can clearly distinguish two types of such warranty by "tacit representation." In the one (as in warranty of title by the ordinary seller, or of authority by an agent assuming to act as such) the representation is so clearly expressed in fact that reasonable men could hardly differ as to its existence. The seller merely expresses himself by acts instead of words. In the other class, that under discussion in this comment, the representation is, if existent at all, at least ambiguous. Men might differ as to its scope. The duties it imposes when it is uniformly assumed to exist and a uniform scope is given it are therefore quite as likely to be non-consensual as consensual. Professor Costigan's remarks in (1907) 20 HARV. L. REV. 206 are suggestive.

wholesomeness."[13] That rule has gradually established itself in the common law; and the interpretation of the Sales Act by the courts bids fair to leave it practically unimpaired.[14] But it is a sweeping rule; some courts have felt it harsh; to the standardized representation and reliance arise then standardized exceptions: "but not in the case of food sold in the original package, where both parties rely on the manufacturer."[15] It must be clear on thought that so far as either the rule or the exception fails to mirror the true state of mind of buyer or seller, we have here the law simply affixing an insurer's duty to a given situation, by reason of history and "policy." And

[13] It has been argued that the "American theory" is *not* reliance, but protection of the consumer's health. 5 IOWA L. BULL. 6, 86. This policy has undoubtedly been strong in the courts' minds; but it is believed the cases show it always joined, expressly or impliedly, with ideas of representation. The desire to protect health is what has *produced* the standardization.—What when the sale is to a dealer, for re-sale for ultimate consumption? The argument against "implied warranty" here is that there is no reasonable ground for standardized "reliance" by one dealer on another. *Cf. Swank v. Battaglia* (1917) 84 Ore. 159, 164 Pac. 705, L. R. A. 1917 F 469. If reasonable reliance in fact existed, this would make a difference, under the Sales Act, sec. 15 (1); so probably in the case of package goods. And even at common law the case would be otherwise if the seller were a maker. The measure of damage would cover loss of custom due to serving food as good, in reliance on the seller's representation. This is the measure which has been held applicable in a suit in tort by a sub-vendee against the maker. *Mazetti v. Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213. But between dealers *wholesomeness* may enter merely as an element of merchantability. See *Piper Co. v. Oppenheimer* (1913, Tex. Civ. App.) 158 S. W. 777; *Neiman v. Channellene Oil & Mfg. Co.* (1910) 112 Minn. 11, 127 N. W. 394; and (1920) 5 IOWA L. BULL. 6, 20.

[14] *Ward v. Great Atlantic & Pacific Tea Co.* (1918) 231 Mass. 90, 120 N. E. 225. The court found in the mere purchase of food from a retail dealer a sufficient indication of the purpose the food was intended for—eating—and of reliance on the seller in the selection of the food, to raise a warranty under sec. 15 (1); applying this even to canned food, unless the customer "demands a particular brand." *Jackson v. Watson & Sons* [1909] 2 K. B. 193; *Rinaldi v. Mohican Co.* (1918) 225 N. Y. 70, 121 N. E. 471. The New York court made the facts above indicated conclusive of warranty, if nothing more was shown—where the seller had had an opportunity to examine. This leaves it open to require something further, in the case of original package goods. New York also soundly rejects the indications in the Massachusetts cases that the existence of the warranty must turn on who does "the" selecting: selection by the purchaser *for any other purpose than to secure wholesomeness* should be wholly without effect on the warranty of wholesomeness.

[15] *Bigelow v. Maine Central Ry.* (1912) 110 Maine, 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; see *Walters v. United Grocery Co.* (1918, Utah) 172 Pac. 473; see *Flessher v. Carstens Packing Co.* (1916) 93 Wash. 48, 160 Pac. 14; *cf. Mazetti v. Armour & Co., supra,* n. 12. But this view, while it seems to be finding favor, is not universal. *Sloan v. Woolworth Co.* (1915) 193 Ill App. 620; *Friend v. Childs Dining Hall* (1918) 231 Mass. 65, 120 N. E. 407 (Sales Act); *cf. Rinaldi v. Mohican Co.* (1918) 225 N. Y. 70, 121 N. E. 471 (Sales Act); *cf. Walden v. Wheeler* (1913) 153 Ky. 181, 154 S. W. 1088, 44 L. R. A. (N. S.) 597 (cattle feed; rescission allowed, but not incidental damage).

if the "warranty" be held as in the *Davis* case to cover users generally, we have an insurer's duty on a manufacturer which in its nature jibes point for point with his duty in tort; it differs only in that it is more severe, and, apparently, requires the additional fact of a *sale* by him, to come into existence.

It admits of a serious doubt whether sellers, in the main, would willingly assume such flat insurance of quality if their attention were called to the question; or whether buyers would expect them to; it admits of doubt equally serious whether, if they would not, the law should, by main strength, force an insurer's duty—as opposed to a duty to use all due care—into these cases.[16] But what with the common-law rules protecting consumers of food, and the Sales Act on food and other articles, there is, as indicated above, strong modern trend to extend this form of insurer's duty much further than in the past. This is not without analogy in other fields—as instance the Workmen's Compensation Acts—and there should be no hesitation in imposing such duties whenever they have been fairly shown to be socially desirable. But in the matter of implied warranty, such a showing is still lacking. Neither the true nature of the doctrine, its basis in policy, nor its social results have yet been satisfactorily examined.[17]

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[16] See (1918) 27 YALE LAW JOURNAL, 1068, 1071, and cases cited; *cf. Merrill v. Hodson* (1914) 88 Conn. 314, 91 Atl. 533, (1914) 24 YALE LAW JOURNAL, 73; *Travis v. L. & N. R. R.* (1913) 183 Ala. 415, 62 So. 851; *Valeri v. Pullman Co.* (1914, S. D. N. Y.) 218 Fed. 519. *But it should not be forgotten that* res ipsa loquitur *can be used to make a negligence rule approach very close to a rule of guaranty.*

[17] The *law* has been reviewed extensively. (1918) 27 YALE LAW JOURNAL, 1068; (1918) 16 MICH. L. REV. 555; (1919) 7 CALIF. L. REV. 360; (1918) 32 HARV. L. REV. 71; (1919) 3 MINN. L. REV. 285; 15 L. R. A. (N. S.) 884; 19 *ibid.* 923; 48 *ibid.* 213, 219; *ibid.* 1917 F, 472. By all odds the ablest and most exhaustive treatment is by Rollin M. Perkins, *Unwholesome Food as a Source of Liability* (1919-20) 5 IOWA L. BULL. 6-35, 86-111. There the English theory of reliance by the purchaser is contrasted with the American theory of protection of the consumer of food, as a basis for imposition of the warranty. The author's analysis of the subject matter is in the main admirable, and his views as to the logical consequences of the American theory—with which he is in full agreement—are so strongly argued as to be almost inescapable—unless, perhaps, his belief that the Sales Act will work no substantial change. See note 13, *supra.* Nevertheless, the vital basis of this growing doctrine has yet to be examined. Research into economic and sociological facts is not a pursuit for which judges have great leisure. Cases must be decided as they arise, and criticism should be made with that in view. But careful research into *facts,* not merely into *decisions,* is needed before any man can intelligently judge whether an "implied warranty" of wholesomeness is socially desirable at all, and how far it can wisely be extended. Studies by the Health Departments of our cities might provide a foundation. It is suggested, with some diffidence, that such a study ought to include: the number of cases of injury from impure food, and some estimate of the damage; a classification of the damage according to the nature of the defect causing it, to determine how far due care can control such damage, and how far, therefore, a warranty rule might work a

If we assume, however, the wisdom of imposing this insurer's duty on the dealer in food, then there is much to be said in favor of the decision in *Davis v. VanCamp Packing Co.* There is sharp division on whether a dealer who is not a maker "impliedly warrants" food sold by him in the original package. Assume first, that he is held not to. Then we have this rather anomalous situation: if you buy bulk food, A, the dealer, insures you; B, the maker or grower, answering only for due care. If you buy package food from the same dealer A, you gain nothing against B, while you lose your claim on A as a dealer. If food ought to be insured to the consumer, something is wrong. The *Davis* case would find the remedy in making the manufacturer insure. Now assume that the dealer is held to "warrant" package food. What reason now for the *Davis* decision? If there be any truth in the suggestion that "implied warranty" arises from tacit representation, reasonably relied on, the case is still sound. Surely a man who packs food for sale makes a tacit representation to any consumer as sweeping as is the representation of a retailer who sells food.[18] And surely any legitimate user is, if anything, even more fully justified in his reliance in the case of goods in can or package. The proof of package pudding is only in the eating. We cannot inspect before purchase; to open is to destroy. And even before eating package food, especially where already cooked, it is difficult to test with certainty. Which one of us can tell, except by taste or indigestion, whether his potted pig-meat be pork or porcupine?

Such reasoning brings up again another much-mooted question. The Van Camp Packing Co. did not sell to Davis. Is "implied warranty" to be attached *only to a sale?* It is easy to lay down such a rule.[19] In *Canavan v. City of Mechanicville* (1920, App. Div.) 180

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change from a rule based on negligence; a further classification of the damage according to food prepared, and food not prepared, by the seller (including a restaurant keeper); and in the latter class, according to food open to inspection and food sold in original packages; an estimate, based on the above, of the financial ability of the parties liable under the various competing rules, to pay the damage that would, under each rule, be imposed on them; a study of the profits of the food business to the dealers and makers (according to the classes into which they fall under the competing rules), so as to see what proportion of additional operating expense the rules, if really carried out, would entail; and finally, a study of the feasibility of distribution of risk, by re-insurance or otherwise, among the various classes of dealers and makers. If small independent dealers, whom a single heavy recovery would ruin, are desirable, the "warranty" can hardly produce general beneficial effects without such re-insurance. The same sort of question comes up in every field of law. For excellent discussion of the general question, see Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353.

[18] See *Tomlinson v. Armour & Co.* (1908, Ct. Err.) 75 N. J. L. 748, 70 Atl. 314, for a clear development of this view.

[19] It is laid down, practically, in the cases cited in note 15. *Cf.* also *Walters*

N. Y. Supp. 62, the plaintiff was a householder in the defendant city; he contracted typhoid from germs contained in the water furnished him. When he sued the city on an "implied warranty" of wholesomeness, a demurrer to his complaint was sustained.[20] "Unless there be a sale with the ordinary circumstances of transfer of title and possession of the thing sold, for a price given for a particular thing, the peculiar facts out of which a warranty is implied do not exist, and there is no warranty." The court would seem sound in its analysis. What the plaintiff paid for is indeed a "privilege to make use of the water as it passed through his dwelling . . . precisely as a riparian owner might enjoy the right [privilege] to take water from an open stream."[21] And where the cost of water supply is met by assessments on the realty benefited, the analogy is close, to a coöperative project. But to conclude from this that there *can be* no warranty is coffee-mill jurisprudence. If the project be coöperative, would not the law do well to apportion the loss incident to its defective execution? The transaction is not a sale—granted. But that does not touch the vital questions: why do we attach an insurer's duty to sales of food and drink? and do the same reasons exist, equally strong, for attaching such a duty to the sale of a privilege of consumption?[22] Practically the same problem is to be found in the recent cases threshing over the question of "implied warranty" by a restaurant keeper. He sells, at least at a *table d'hôte* meal, not food, but a privilege of consuming food. That is sound; but it only prepares the way for an answer to the question of his insurer's duty, or of his infraction of criminal statutes against the "sale" of game out of season, or of liquor. Careful analysis is good to see; without it the law cannot escape confusion. But analysis of itself can *solve* no problems. It brings clarity of statement; it does not bring wisdom of decision.

K. N. L.

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v. United Grocery Co. (1918, Utah) 172 Pac. 473. *Contra, Friend v. Childs Dining Hall Co.* (1919) 231 Mass. 65, 120 N. E. 407. See (1918) 27 YALE LAW JOURNAL, 1068, 1069; and that the New York rule agrees with Massachusetts (1920) 5 IOWA L. BULL. 96 ff.

[20] In accord see *Green v. Ashland Water Co.* (1898) 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117. The court there reasoned largely from the unbearable burden which the warranty would impose upon the supplier of water. But how unbearable the burden would be, depends on facts not considered in the opinion. See note 17, *supra.*

[21] It should, however, be observed that he also obtained a power, to make such water his own by appropriating it, and so to acquire title and possession of a thing—as does a riparian owner.

[22] Indeed, may not the reasons exist, even where no consideration at all is given the insurer? He is already under such a duty to use all due care. See Swayze, *The Growing Law* (1915) 25 YALE LAW JOURNAL, 1, 4-7.